SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1282

WILLIAM RONALD WELCH,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent accepts the Statement of the Case as contained in Petition For A Writ of Certiorari heretofore filed by petitioner.

I. ANSWER TO PETITIONER'S ALLEGATION THAT THERE WAS EFFECTUATED A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS BY THE ADMISSION OF EVIDENCE OBTAINED THROUGH AN ILLEGAL AND DEFECTIVE SEARCH WARRANT.

FACTS

The petitioner was arrested on Saturday, August 13, 1966, at about 1:00 a.m. by Montgomery County Sheriff's

Deputy, Robert Massie. (T.R. 550)[1] He was arrested for speeding and driving a motor vehicle while under the influence of alcohol. (M.S. 77)[2] (T.R. 550) Petitioner pleaded guilty to the speeding charge and pleaded guilty to "reckless operation of a motor vehicle" which is a lesser and included offense of driving a motor vehicle while under the influence of alcohol. (M.S. 182) Petitioner's automobile was towed to the Montgomery County Jail garage parking lot and a sign was placed on its saying, "Do not touch." (T.R. 320) Detective Tucker was not on duty at that time. On Monday, August 15, 1966, when Detective Tucker returned to duty he appeared before Robert L. McBride, Judge, Common Pleas Court, Montgomery County, Ohio, and requested authority to search petitioner's 1962 red Cadillac and his residence, located at 137 N. Smithville Road, Montgomery County, Ohio. Judge McBride issued warrants for the search of petitioner's automobile and residence after a consideration of Detective Tucker's affidavits and exhibits which were incorporated therein and attached thereto. Before issuing the search warrants, Judge McBride had made a finding that probable cause existed for the warrants. Judge McBride affixed his signature to the journal entries and search warrants. His signatures are legible.

Later on August 15, 1966, Detective Tucker executed the search warrants and as a result of the search of petitioner's residence he found an Accutron wrist watch with initials H. D. appearing on the back of the watch just as he had claimed in his affidavits and warrants. Also, Detective Tucker had discovered various billfolds, each with different identifications and also several watches, which

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[1] "T.R." refers to transcript of trial, Volumes II and III of the Bill of Exceptions.

[2] "M.S." refers to transcript of hearing on motions to suppress, Volume I of Bill of Exceptions.

property he knew was stolen merchandise from the various complaints which were made and filed at the Montgomery County Sheriff's Office by other victims of robberies. The receiving or concealing of stolen property constitutes a criminal offense under the laws of the State of Ohio. Those items were confiscated by Detective Tucker. A search of petitioner's automobile produced several bottles of scopolamine which had been mentioned in the same affidavits of Detective Tucker.

Prior to the trial, petitioner through counsel filed several motions to suppress evidence attacking the propriety and issuance of the search warrants. The Trial Court conducted an extensive, independent hearing on these issues all of which appears in the Transcript of Hearing on Motions to Suppress. Sworn testimony was taken from nine witnesses after which the Court overruled petitioner's motions as not being well taken. During the trial the Court was called upon to rule on the admissibility of the items of evidence which had been obtained as a result of Detective Tucker's search of petitioner's automobile and residence.

This entire matter was before the Court of Appeals for Montgomery County, Ohio, in Case No. 3181, at which time petitioner attacked the propriety, issuance and execution of the search warrants in question. The Appellate Court ruled that after a complete review and analysis of the record it failed to disclose any error prejudicial to the substantial rights of the defendant-appellant nor did it find any particular defect in this area which upon reason or authority was violative of petitioner's constitutional rights. The Supreme Court of Ohio agreed with the Appellate Court's reasoning when it declined to accept the matter for review inasmuch as no substantial constitutional question was involved therein.

REPLY TO PETITIONER'S ARGUMENTS

Petitioner complains that several spaces were left blank on the search warrant, however, the omissions, if any, were ministerial in nature and a technical irregularity which do not go to the substantive issue. Petitioner cites *State* v. *Vuin*, 89 O.L.A., 193, however, that case has no application herein inasmuch as the issuing magistrate failed to sign the search warrant which is not the situation in the instant case. The court in *State* v. *Laws*, 233 A. 2d 633, stated that search warrants are to be read sensibly rather than hypercritically and should be deemed legally sufficient so long as they contain factual assertions which would lead a prudent man to believe that a crime had been committed and that the evidence, fruits or instrumentalities of the crime were at the place sought to be searched. Also, assuming some unexecuted blanks, the Court is reminded that a judicial preference is accorded to searches under a warrant. *Jones* v. *United States*, 80 S. Ct. 725; *United States* v. *Ventresca*, 85 S. Ct. 741. Further, *United States* v. *Ventresca* appears to be a specific mandate for the proposition that the affiant may affix and attach a page or pages to his affidavit, upon which he has stated various facts in detail alleging probable cause for the issuance of the warrant and to incorporate same by reference to the affidavit.

Petitioner complains that the affidavits and search warrants are defective in that they fail to establish the reliability of the "confidential informant." Petitioner neglects to inform this court of the remaining eight or nine statements of fact or averments of probable cause which are contained in Exhibit A. The facts and information contained in Exhibit A were in the personal knowledge of Detective Robert L. Tucker, the affiant.

Petitioner claims that Detective Tucker had no information that scopolamine had been used in either the Kantra,

Moles or Richardson matters and that his belief that scopolamine was involved was derived from tests conducted relative to Mr. Marcoux. The tests conducted relative to Wayne Marcoux and the positive results of scopolamine were made known to Detective Tucker several weeks prior to the issuance of the search warrants. William J. Miller, the chemist who conducted these tests did so on July 21, 1966. (T.R. 341) Further, Detective Tucker stated that he knew in February of 1966 that examinations of Ray Kantra disclosed that he had been under a Belladonna type drug. (M.S. 21) Scopolamine is an alkaloid of that drug. The search warrants were issued on August 15, 1966. We respectfully refer the Court to the testimony of Robert L. Tucker to determine what he knew prior to his obtaining the search warrants rather than relying on petitioner's brief. See (M.S. 16 thru 61)

Petitioner complains that State's Exhibit 20, a Zippo cigarette lighter, identified by witness John C. Moles as his property was the product of an illegal search and seizure. This appears to be an attack on the administrative, inventory book-in procedure, which every jail must use. The purpose of the procedure is to safeguard the property of the suspect. He is given a receipt for his property as he enters the jail. This is for the protection of the suspect but it unavoidably works against him when the fruits, instrumentalities or a link to previous crimes are provided to the police. This procedure and its legality are universally recognized and approved. *State* v. *Darabcsek*, 412 S.W. 2d 97; *Arabia* v. *State*, 421 P. 2d 952; *Baca* v. *People*, 418 P. 2d 182. State's Exhibit 20, was identified by the witness, John C. Moles. The name "J. C. Moles" and telephone number "849-0602" was inscribed thereon. (T.R. 435) Detective Tucker obtained the cigarette lighter on August 13, 1966. Detective Tucker

knew that State's Exhibit 20 was stolen property in March of 1966. (M.S. 23)

Petitioner further complains of an exploratory search; we submit he misses the point entirely. Detective Tucker was lawfully on the premises in the execution of the search warrants and discovered some of the items for which he was searching. (M.S. 57) (T.R. 409) He had been assigned all the drug-robbery complaints and when he discovered other stolen property being concealed by petitioner, and this being a criminal offense under the Ohio Statutes, it became his duty of confiscate this stolen merchandise. (M.S. 60)

Petitioner also claims that his residence was searched on two different occasions. Detective Tucker along with other personnel from the Montgomery County Sheriff's Office began their search of petitioner's residence on August 15, 1966, at 4:30 p.m. and stayed about two hours. (M.S. 51) The search of the house was not completed at that time but was continued and completed the next day or on August 16, 1966. (M.S. 57, 58, 59) (M.S. 83, 89). The officers had a warrant which authorized a search of the premises during the daytime. (M.S. 89) Therefore, the officers did not conduct two independent searches of petitioner's premises but actually began the daytime search on August 15, 1966, and continued and completed the search the following day.

Finally, on page 9 of petitioner's brief there appears the following quotation:

> "Eight or nine briefcases and what not. Just a whole slew of things which he (Detective Tucker) was checking on to find out who the owner was." Summation of Prosecutor T. R. 709.

We submit to this Court that the statement which has been taken out of context, was fair comment on the evidence. See cross-examination of Detective Robert L.

Tucker by petitioner's trial counsel. (T.R. 410 thru 422) This testimony or evidence which indicates that petitioner had committed other crimes (receiving or concealing stolen property) was not elicited nor introduced by the State but by the petitioner himself. The only evidence which was introduced at petitioner's trial by the State of Ohio was evidence which was directly responsive and relevant to the issues or charges for which petitioner was standing trial, including exhibits and testimony which indicated that petitioner may have perpetrated like or similar acts upon other citizens.

Further, respondent maintains that Detective Tucker did not have to know positively who the individual, legal owner was of each and every personal item of property such as watches, keys, jewelry, briefcases, billfolds with different identifications therein to know or to have reasonable grounds to believe that they were stolen property. These items of property were discovered in petitioner's residence in the same area and adjacent to other items which had been reported stolen to the Montgomery County Sheriff's Office and Detective Tucker. Some of the property had been listed in the affidavits and search warrants.

II. ANSWER TO PETITIONER'S ALLEGATION THAT THE ADMISSION OF EVIDENCE OF SIX ALLEGED SIMILAR ACTS OF THE PETITIONER FOR THE PURPOSE OF BEARING THE BURDEN OF PROOF OF THE CRIME CHARGED, DID PREJUDICIALLY EFFECTUATE A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS.

Petitioner says in his brief that the vast majority of the 570 pages of testimony found in the transcript related to evidence of like or similar acts of the petitioner. However, if one would objectively appraise the recorded testimony of Ray Kantra, James T. Smith, Mollie Taylor, Gilbert Nelson, Andrew Papanek, Robert Tucker, William J.

Miller, Frank Cleveland, Robert Massie, and all the discussions with the Court and counsel which took place out of the presence of the jury and which was not evidence, one would find that the vast majority of the 570 pages did in fact relate to the charges for which the petitioner was convicted and not like or similar act evidence.

Further, the respondent submits that the number of pages of recorded testimony has no bearing upon the issue involved especially when considering the Trial Court's charge to the jury relating to the proper use of the evidence. This charge appears under Respondent's Answer III in this brief. The Trial Court instructed the jury that they could not consider this evidence as proof that the defendant committed the offenses for which he is now on trial. (T.R. 204, 205) (T.R. 268, 269) (T.R. 539, 540) (T.R. 759)

There are numerous citations upholding the use and propriety of Ohio Revised Code 2945.59. *State* v. *DeRighter*, 145 Ohio St. 552; *State* v. *Moore*, 149 Ohio St. 226; *Whiteman* v. *State*, 119 Ohio St. 285, and *Barnett* v. *State*, 104 Ohio St. 298; *State* v. *Pack*, 18 Ohio App. 2d 76. Further this section dealing with evidence of like or similar acts of the defendant was held to be constitutional by the Court of Appeals in *State* v. *Hahn*, 59 Ohio App. 178. An appeal to the Ohio Supreme Court was dismissed (133 Ohio St. 440), the court holding that no debatable constitutional question was involved. On appeal to the Supreme Court of the United States; reported in 305 U. S. 557, 83 L. Ed. 351, 59 S. Ct. 75, the appeal was dismissed for the want of a substantial federal question. The above citations are in point in that they relate directly to the "like or similar act statute." Further, the defendant in *State* v. *Hahn* was convicted and sentenced for the crime of murder in the first degree in that he unlawfully administered a poison to the deceased. The

petitioner in the instant case, has been convicted and sentenced for unlawfully administering a poison to the victim, Raymond Kantra.

Petitioner cites *State* v. *Hirsch*, 1 O.O. 2d 349, however, it appears that the appellate court set aside the verdict of guilty therein since the convicted defendant was an aider and abettor to the principal, co-defendant who had been acquitted at the same trial and by the same jury which convicted appellant, Hirsch. Further, the court mentioned therein that the court and prosecutor referred to section 2945.59 as a "similar offense-statute" when they should have referred to it as a "similar act statute." This decision has no bearing on the instant case. Petitioner also mentions *State* v. *Herbert* 8 O.O. 382, however, the appellate court therein held that the trial court should have sustained appellant's motion for a new trial inasmuch as a juror on voir dire examination withheld information and denied having any connection with the injured party or complainant in the case when in fact he did have such connections. Further, the court held that it was an abuse of discretion for the trial court to permit the State to introduce ninety separate transactions which were purportedly like or similar to the one charged. This situation just does not appear in the instant case. The remaining two cases cited by petitioner do not involve the "like or similar act statute." (Revised Code 2945.59)

The Supreme Court of Ohio in *Clyne* v. *State*, 123 Ohio St. 234, held that the "like or similar act statute" was a rule of evidence and not a rule of substantive law. It appears that the Supreme Court of the United States cannot and will not ordain or promulgate state rules of criminal procedure for the various states. *Spencer* v. *State of Texas*, 87 S. Ct. 648. Also, the Court said in *Michelson* v. *United States*, 69 S. Ct. 213, that this court was not the best forum for developing rules of evidence for the lower

federal courts either. Those cases involved similar subject matter to that present in the instant case; namely, the past conduct of the petitioners therein for which they had already stood trial and had been convicted. It would appear that any possible prejudice to a petitioner would be far greater and more severe where a conviction is involved. This is not the situation in the instant case but rather conduct or acts which are like or similar to the one charged.

III. ANSWER TO PETITIONER'S ALLEGATION THAT THE INSTRUCTIONS OF THE COURT RELATIVE TO THE ALLEGED SIMILAR ACTS OF THE PETITIONER WERE SO CONFUSING AND CONTRADICTORY IN TERMS AND SO ABSENT OF INFORMATIVE VALUE AS TO UNDULY PREJUDICE PETITIONER'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL.

The Trial Court in charging the jury as to similar acts said:

> "There is evidence in this case which tends to show that the defendant committed like acts as the one charged in this case on or about February 2, March 16, July 6, July 8, July 16, and August 2, 1966, against Richard Critchfield, Johnnie C. Moles, Raymond Cutlip, Howard Richardson, Wayne Marcoux and Rollin Fahrenkamp, respectively, and as the court has said, the state claims that these other acts are somewhat similar to or like the act of February 24, 1966, charged in the indictment in this case."
>
> "Like and similar acts, when closely enough related as to time and place to the alleged acts charged in this case, may be shown for the limited purposes defined by section 2945.59 of the Ohio Revised Code, which in its pertinent parts reads as follows:
>
> > "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or

system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part or the defendant's scheme, plan or system in doing the act in question may be proved, whether they are contemporaneous with, or prior or subsequent thereto . . ."

"As the court has said, evidence has been offered in this case tending to show that defendant committed other acts shortly prior or subsequent to February 24, 1966, that are or may be somewhat similar to or like the alleged acts in this case. This evidence, including the state's exhibits relative to such other acts, is not to be considered by you as proof that defendant committed the act for which he is now on trial, but it may be considered by you for the purposes of determining defendant's motive or intent, the absence of mistake or accident on his part, or a scheme, plan or system used by him."

"Keep in mind that this evidence is not to be considered by you as substantive evidence or proof of the commission of the offenses charged in this case; rather, you are limited in your consideration of such evidence to the purposes specifically set forth in section 2945.59, Revised Code, just read to you by the court." (T.R. 758, 759)

Obviously, the Trial Court did not simply quote Revised Code 2945.59 as is indicated in petitioner's brief but gave the jury a clear and complete instruction with regard to this rule of evidence and how it could be applied by the jury to the testimony and exhibits which had been introduced to it. Further, the Trial Court on several occasions during the course of the trial itself admonished the jury with regard to this type of evidence. (T.R. 204, 205) (T.R. 250) (T.R. 269, 270). Further, on page (T.R. 425) it appears that petitioner's counsel waived any further instruction by the court to the jury on this rule of evidence.

Petitioner asks whether a jury can be expected to distinguish between such technical criminal elements as motive, intent, absence of mistake or accident on his part or his scheme, plan or system of doing the act in question since the court did not inform the jury upon which of the issues the evidence was to be considered by them.

The obvious reason is because the evidence which was introduced pursuant to Revised Code 2945.59 was admissible for all of the issues or reasons listed in the statute. One can readily understand the relevancy of this evidence simply by reading the transcript of the testimony of the witnesses who testified in effect that the petitioner had perpetrated like or similar acts upon them. Further, it was not necessary for the jury to distinguish between motive, intent, absence of mistake or accident on his part, his scheme, plan or system of doing the act in question. This terminology is plain English, self explanatory and easily understood and all the terminology relates to the same subject matter which is the presence or absence of the defendant's intent. This type of language does not need further definition as would an abstract standard of proof such as "beyond a reasonable doubt."

Also, the Court specifically instructed the jury many times that this type of evidence was not to be considered by them as substantive evidence or proof of the commission of the offenses charged in this case.

IV. ANSWER TO PETITIONER'S ALLEGATION THAT THE REMARKS OF THE PROSECUTION, DURING SUMMATION TO THE JURY, DID CONSTITUTE HARMFUL ERROR WITHIN THE PURVIEW OF THE PETITIONER'S CONSTITUTIONALLY AFFORDED RIGHTS.

The Trial Court instructed the jury in part as follows at the conclusion of closing arguments:

> "at the opening of the trial, counsel for the state and defendant made statements as to what the evidence introduced in the case would show. The opening statements are not evidence, but were made so that you might better understand and follow the evidence as it was later introduced. Any part of such opening statements that may not have been supported by the evidence introduced in this case should be entirely ignored. The comments and arguments of counsel, and the comments of the court during the progress of the trial are not evidence in the case." (T.R. 762, 763)

The Court further said:

> "The facts are for your determination from the evidence. The evidence consists of what the witnesses have been permitted to say to you from the witness stand. . . . In arriving at your verdicts it is your strict and conscientious duty to exclude from your consideration anything that you may have observed or heard concerning this case which is not a part of the evidence. The importance of your duty as jurors requires that you should consider and weigh the evidence with great care, and arrive at just and fair verdicts, without fear of favor, without sympathy, passion or prejudice." (T.R. 763)

In addition thereto and immediately prior to the closing arguments of counsel for both sides the Trial Court had already cautioned the jury in part as follows:

> "Now, these statements (referring to closing arguments) they will make to you concerning the evidence will, I am sure, reflect the actual state of the evidence as much as is humanly possible, but should any of them make a statement that according to your best recollection of the evidence is not supported either in whole or in part by the evidence, you should disregard such statement and rely upon the evidence in the case as you recall it, either the testimony or the exhibits introduced in evidence constituting the evidence in the case.

> . . . but it is entirely up to you as to what the evidence shows. Your findings of fact will be controlling because you are the sole judges of the facts in the case. The court is the sole judge of the law." (T.R. 701)

Petitioner claims in his petition that the prosecutor misstated the facts when he referred to the amount of scopolamine that Raymond Kantra had and then proceeds to support that position by calling the court's attention to Dr. Nelson, a biochemist who testified that he had found atropine and scopolamine in the blood and gastric samples which were taken from Raymond Kantra and the tests he conducted was a qualitative one. However, he fails to point out that the jury had for its consideration a great deal of other testimony besides the testimony of Dr. Nelson which related directly to the condition of Raymond Kantra. There was the direct testimony of Raymond Kantra himself as to his condition before and after taking the scopolamine (T.R. 18 thru 38 and 63 thru 91) which testimony was corroborated by Mollie Taylor (T.R. 105, 106) and Andrew Papanek (T.R. 180 thru 185) both of whom testified as to the appearance, manifestations and condition of Mr. Kantra. Further, there was the testimony of Detective Tucker who testified that he had found several bottles of white pills, one of which was labeled scopolamine in the glove compartment of the petitioner's car. (T.R. 323) In addition, the jury was able to consider the expert testimony of William J. Miller (T.R. 334 thru 360) the expert testimony of Dr. Frank P. Cleveland, a toxicologist (T.R. 360 thru 387) and also the expert testimony of Dr. Thurston K. Batson (T.R. 571 thru 637) whose testimony related to amounts of scopolamine and the effects of a certain dosage on an ordinary individual. It is quite clear that the jury had many types of evidence for its consideration on this matter such as direct, circumstantial, scientific, medical, and expert testimony. The petitioner is attempting to take

a partial statement out of the context in which it is said and try to establish a certain significance to it without considering all the evidence in the case. The prosecutor's statement was based on the evidence and was fair comment.

The petitioner cites *Adams* v. *State*, 192 So. 2d 762, and *State* v. *Jones*, 124 N.W. 2d 727, but after a consideration of those decisions and the remarks made by counsel therein it becomes apparent that they have no application to the case at hand.

Also, petitioner claims that the prosecutor commented to the jury on petitioner's failure to take the witness stand and testify in his own behalf. He cites *Griffin* v. *California*, 380 U.S. 609 and *Desmond* v. *United States*, 345 F. 2d 225, neither of which are applicable to the facts in the instant case. The comment in *Griffin* was a direct reference to the defendant himself and his refusal to take the stand and testify. Further, the trial court in so many words, had instructed the jury that it could draw certain inferences from the defendant's failure to explain or deny facts within his knowledge and that those inferences unfavorable to the defendant are the more probable. The facts or comment in the instant case do not come within the holding of the *Griffin* case. It appears that trial counsel for the petitioner agrees with this conclusion.

> Mr. Rion: . . . "I think it is about as near a comment that the prosecution can make." (T.R. 710, 711)

Petitioner also claims that the remark can only be attributed to the petitioner's failure to testify and that the circumstances of the case in no way imposes an obligation upon Eva Green and Margaret Craft, the girlfriend and mother, respectively of petitioner *to know or explain the source of the articles seized.*

Perhaps, these defense witnesses had no obligation to explain the presence or source of the stolen merchandise

but they certainly were in a position to do so. Eva Green testified that she was present in a room at the Sheridan-Gateway Motel with the petitioner and Mr. Critchfield, who was drugged and robbed on or about February 7, 1966. Further, she testified that she was present with the petitioner and Rollin Fahrenkamp at petitioner's residence when Mr. Fahrenkamp was drugged and robbed on or about August 2, 1966. Eva Green admitted she took scopolamine with the petitioner on various occasions and that she shared the residence with petitioner at 137 N. Smithville Road and that on other occasions she would spend evenings and all night at that location. (T.R. 647 thru 673) (T.R. 684 thru 687) Mrs. Craft testified that she, too, had scopolamine in her possession and that she had taken them. (T.R. 688) The distinguishing point here is that this is not a case where the petitioner did not testify and also did not offer any witnesses in his behalf. Numerous witnesses were called by the petitioner and the facts, circumstances and evidence clearly show that they were in a position to explain the presence or source of the stolen items which they failed to do. Of course, because of the above reason the rationale of the *Desmond* case has no application to the case at hand.

The arguments of counsel must be judged in the entire context and for cases holding similar remarks as in the instant case not to be a comment on the defendant's refusal to testify. See *Martinez* v. *People*, 425 P. 2d 299; *Glass* v. *State*, 411 S.W. 2d 728; *Beecher* v. *State*, 193 So. 2d 505; *Patterson* v. *State*, 416 S.W. 2d 816; *State* v. *Bumpers*, 155 S.E. 2d 173; *State* v. *Costello*, 415 S.W. 2d 816.

The error, if any, is harmless. *Chapman* v. *California*, 87 S. Ct. 824; *People* v. *Ross*, 429, P. 2d 606; *People* v. *Boyden*, 60 Cal. Rptr. 271, *People* v. *Hudgins*, 60 Cal. Rptr. 176; *Walsh* v. *United States*, 371 F. 2d 135; *People* v. *Modesto*, 427 P. 2d 788; *People* v. *Baker*, 152 N.W. 2d 42.

V. ANSWER TO PETITIONER'S ALLEGATION THAT THE DENIAL BY THE TRIAL COURT OF THE PETITIONER'S MOTION FOR COPIES OF GRAND JURY TESTIMONY DID CONSTITUTE PREJUDICIAL ERROR.

Petitioner cites *Dennis* v. *United States*, 384 U.S. 855, and *Youngblood* v. *United States*, 379 F. 2d 365 to support his position. However, those cases dealt with convictions of defendants for violations of federal laws and trial procedures in federal courts. The Supreme Court in the *Dennis* case recognized the long established policy that maintains the secrecy of the grand jury proceedings in the federal courts. The Supreme Court therein was concerned with Rule 6 (e) of Federal Rules of Criminal Procedure which deals with the Secrecy and Disclosure of matters before grand jury. The trial court had overruled petitioner's motion for production of transcripts of grand jury testimony of four government witnesses who testified at the trial since there had been no showing of a "particularized need." The Supreme Court held in essence that the trial court committed an abuse of discretion when applying Rule 6 (e) to the facts in the *Dennis* case since the facts clearly showed a "particularized need." *Dennis* v. *United States*, 384 U.S. 855, at 872. The Supreme Court was exercising its supervisory power over federal courts, federal law and federal procedure. .

The trial court in the instant case had to apply the state rules of criminal procedure which encompasses Ohio Revised Code 2939.11. This statute and the opinion of the Supreme Court of Ohio in *State* v. *Rhoads*, 81 Ohio St. 397, bind the state trial courts to grand jury secrecy and are not allowed to order the prosecuting attorney to deliver grand jury minutes or transcripts of evidence taken to the defendant or his counsel.

The petitioner herein is well aware of the thrust and application of *Dennis* v. *United States* and its holding does

not involve a constitutional right but he attempts to bridge that gap by alleging that the Trial Court denied him his right to confront the witnesses against him and to prepare and present his defense.

This is an extremely tenuous proposition since the petitioner was present at his trial when the witnesses testified against him. Further, the petitioner was present at a hearing on a motion to suppress certain evidence and/or discovery hearing which took place prior to the trial itself and at which hearing the petitioner subpoenaed twenty witnesses who later testified on behalf of the State of Ohio. (M.S. 5) The Trial Court instructed petitioner as follows:

> "The Court: under the law you are permitted to talk to State's witnesses, and under the law you are permitted to take depositions." (referring to the State's witnesses) (M.S. 5)

Needless to say, petitioner does not cite any authority whatever for his vague allegation that he was denied his right of confrontation of accusers and that he was not able to prepare and present his defense simply because the Trial Court overruled his motion for production of grand jury transcripts of testimony at trial.

Finally, petitioner alleges in his brief at page 19 that respondent admits that the federal rule concerning the availability of grand jury testimony was violated. Perhaps, this is wishful thinking on the part of petitioner's counsel.

The respondent submits:

> (1) that 6 (e) of Federal Rules of Criminal Procedure and the holding of the Supreme Court in the *Dennis* case have no application to the case at hand.
>
> (2) that if the federal rule concerning the availability of grand jury testimony were applicable to the instant case the rule would not have been violated inasmuch as the Trial Court's ruling could not have

constituted an abuse of discretion with regard to the facts in the instant case which do not reflect any need whatever on the part of petitioner to have the grand jury transcripts.

(3) the facts in the instant case show that at the time of petitioner's trial, counsel was engaging in a belated fishing expedition and an untimely discovery technique and his request for the grand jury transcripts was a naked attempt without any showing of materiality, relevancy or need.

CONCLUSION

For the reasons stated herein and since petitioner does not state grounds which involve a substantial federal question, it is respectfully submitted that his petition for a writ of certiorari should be denied.

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